CONTROLLING IMMIGRATION LITIGATION — A LEGISLATIVE CHALLENGE

John McMillan

Immigration litigation has steadily become a controversial feature of Australian law and policy. After earlier unsuccessful attempts to stem the tide of immigration litigation, the Commonwealth Parliament in September 2001 enacted a new package of legislative controls in the wake of the public dispute about the Tampa. This article examines the new legislative controls and the issues to which they may give rise.

For much of the last century Australian immigration law rested on two key controls: an officer of the Department had a discretion to decide who was allowed to enter Australia; and the Minister had a discretion to deport a person who was unlawfully in Australia.[1] Within the scope of that skeletal framework, government policy on migration could be developed, implemented and altered with few legal obstacles to surmount. Decisions on entry and deportation went largely unchallenged at the administrative level. The unfettered nature of the discretionary powers was respected as well by the courts.

In time, a different view took hold of the need for criteria to be spelt out in legislation and for procedural safeguards to be established.[2] This was reflected in the growth in size of the *Migration Act 1958* (Cth), from 35 pages in 1958 to nearly 500 pages (plus voluminous Regulations) in 2002.[3] The steady growth in legal rules was soon accompanied by a comparable growth in disputes about whether those rules were being correctly applied. The age of immigration law — now the most controversial and the single largest area of public law adjudication by courts and tribunals in Australia — had arrived.

Enter a new element into this storm: the *MV Tampa*, seeking to land at Christmas Island in August 2001 with a boatload of 433 people rescued from a sinking vessel *en route* to Australia. The arrival of the *Tampa* became the catalyst for the enactment by the Commonwealth Parliament the following month of a legislative package that dramatically changed the shape of the *Migration Act*. Both the *Tampa* and its legislative entourage sparked an intense public debate that is likely to continue for some time about whether Australian immigration law and practice is sensibly firm or unsuitably harsh. The purpose of this article is not to join that debate, but instead to describe the post-*Tampa* legislative changes and the problems that were being addressed.

CONTROL OF JUDICIAL REVIEW

Background to the recent changes

The change of greatest practical significance was the introduction of an entirely novel scheme designed to limit severely the opportunity for judicial review of migration decisions in the High Court, the Federal Court and the Federal Magistrates Court. The background to those changes stretches further back.

Judicial review of immigration decision-making has been possible since federation, but until the late 1970s the framework was not conducive to litigation. The two options available to a person wishing to challenge an adverse executive decision were to commence proceedings either in the original

jurisdiction of the High Court under Constitution s 75 (v) or in a State Supreme Court exercising federal jurisdiction.[4] In either case the proceedings were by way of common law procedures that could be technical and difficult to use.

Two developments in the 1970s ushered in the contemporary phase of unabated expansion of immigration litigation. The first was the establishment of the Federal Court in 1976,[5] as a court that could bring a specialist focus to disputes arising under Commonwealth laws. The second was the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), which commenced operating in 1979. The Act simplified the procedures for judicial review (ss 11, 16); it codified in a convenient list the grounds on which the validity of an administrative decision could be challenged (ss 5-7); and it created a right to obtain a written statement of the reasons for an administrative decision prior to the commencement of proceedings (s 13). The Act also designated the Federal Court as the court with jurisdiction to hear proceedings under the Act.

The importance of those two changes was reflected in both a steady increase during the 1980s in the volume of immigration litigation, and an increased judicial rigour in the scrutiny of administrative decisions. Partly in response to those trends, but in reflection also of a changed mood during the 1980s in and outside government, a new and reformed legal and administrative framework for immigration decision-making was introduced.[6] The two features mainly relevant to administrative law were that the broad discretions in the *Migration Act* to control movement in and out of Australia were replaced by more specific statutory criteria, and a framework for merit review of adverse decisions was established.

Government had expected that judicial review would diminish in importance after the introduction of objective standards and procedural fairness into immigration decision-making. But it was otherwise. The number of applications before the Federal Court continued to increase,[7] and so too the assortment of legal errors detected by courts.[8] The parliamentary response was to limit judicial review in the *Migration Reform Act 1992* (Cth), which commenced operating in 1994. Two principles underpinned the new scheme. First, decisions in the key areas of visa refusal and refugee determination had to be challenged in the first instance by appeal to either the Immigration Review Tribunal or the Refugee Review Tribunal. Second, judicial review of a Tribunal decision was thereafter possible in the Federal Court, but under a modified scheme in Part 8 of the *Migration Act* rather than under the ADJR Act. Part 8 excluded some of the grounds that were otherwise available under the ADJR Act, notably breach of natural justice, unreasonableness, and relevant and irrelevant considerations. Those open-ended grounds were regarded as incompatible with the detailed and specific criteria and procedures now spelt out in the *Migration Act*. Fairness and legality were to be secured by compliance with a legislative rather than a common law code.

Two problems with Part 8 steadily undermined its effectiveness. The first was that judicial ingenuity found ample scope for legal error within the available grounds and statutory procedures of the *Migration Act*. It is not an overstatement to say that judicial review under the restricted scheme in Part 8 became more

rigorous than under the more ample provisions of the ADJR Act.[9] There are different views on why that happened and whether it was justifiable, but the point of present relevance is that it did happen and that it sparked controversy, within the Federal Court, between the High Court and the Federal Court, and between the Government and the courts.[10] Inevitably, too, the litigation fed on itself. Some onshore visa applicants saw litigation as an end in itself because of the delay it introduced before removal action would be taken; by resorting to litigation they thereby compounded the dilemma it presented for government.

The second problem stemmed from Constitution s 75(v), which confers jurisdiction on the High Court to grant an administrative law remedy to control unlawful action by an officer of the Commonwealth. In two recent cases the High Court held that it could grant relief in circumstances where the Federal Court could not. In both cases there was a breach of natural justice, in one case by the RRT,[11] and in the other case by the Department:[12] that ground, as noted above, was not available in the Federal Court under Part 8 of the *Migration Act*. In both cases, too, the action in the High Court had been commenced well beyond the expiration of the rigid 28 day time limit that applied to proceedings commenced in the Federal Court.

A gap had thus been revealed between the statutory jurisdiction of the Federal Court and the constitutional jurisdiction of the High Court. The message was clear for onshore applicants refused a visa: commencement of proceedings in the High Court should routinely be considered as a supplement or as an alternative to commencement of proceedings in the Federal Court. There was a rapid increase in High Court applications: in the early months of 2002 the Court was receiving on average more than 10 applications per week, with 234 applications on hand at 3 May 2002. Judges of the High Court responded with an uncharacteristically blunt and public message that was critical of Parliament and the Government for having restricted judicial review in the Federal Court and thus contributing to the growth of the High Court's caseload.[13]

Enactment of the privative clause in 2001

In 1997 the Government responded to the trend in litigation by introducing a bill to replace Part 8 with a privative clause.[14] The essence of a privative clause (as explained below) is to restrict judicial review to legal errors of an egregious kind. The proposal reflected the advice received by the Government from six eminent lawyers that this was 'the only workable option'.[15] The proposal met substantial opposition in and outside Parliament, and languished for some time. Much to the surprise of many people, it was enacted late in 2001[16] as part of the package of legislation agreed to by the Opposition in the month of tumult following the arrival of the *Tampa*.

Most decisions made under the *Migration Act* are now defined by s 474 of the Act as 'privative clause decisions'. Section 474 goes on to provide that a privative clause decision 'is final and conclusive', cannot be 'challenged, appealed against, reviewed, quashed or called in question in any court' and cannot be subject to the grant of an administrative law remedy 'in any court on any account'. On the face of it, therefore, s 474 is a complete denial of judicial review. That, however, is not the intended meaning of a privative clause such as s 474, as illustrated by ss 476 and

477 of the Act which acknowledge that an application for judicial review of a Tribunal decision can be made in the Federal Court within 28 days of a decision of the Tribunal being notified to a person. Similarly, s 486A acknowledges the other option of making an application for judicial review in the High Court under Constitution s 75(v), though a time limit of 35 days from actual notification of the decision is imposed by s 486A.

The conundrum posed by those sections — judicial review is denied by one section (s 474), yet is facilitated by other sections (ss 476, 477, 486A) — is to be explained by an established line of legal principle, usually traced to the decision of the High Court in *R v Hickman; Ex parte Fox and Clinton*.[17] There it was held that a privative clause worded similarly to s 474 was to be interpreted as curbing but not ousting judicial review. Specifically, a decision that might otherwise be declared invalid would not be so declared, provided that it is 'a bona fide attempt [by the decision-making body] to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body'.[18] In a later case Dixon J noted that a privative clause would also fail to protect a transgression of 'imperative duties or inviolable limitations or restraints' imposed by legislation.[19] In the same vein is another reference by Dixon J to the importance, when applying a privative clause, of ascertaining whether there has been an 'observance of the limitations and compliance with the requirements [that] are essential to valid action'.[20]

The first point to note about this test — dubbed the *Hickman* test — is that it is framed as a principle of statutory construction. Meaning and operation are attributed to the privative clause on the footing that it is but one section — albeit an important section — in the statutory scheme. To give the privative clause its plain textual meaning that judicial review is not possible 'in any court on any account' would be to set at nought other sections in the statute that place limits on executive power and that are enacted in the context of a system premised on the fundamental principle that the judiciary can restrain unlawful executive action. It becomes a question then of reconciling apparently contradictory directions in a statute: that is, some provisions of the statute impose limits on executive power, while other provisions purport to insulate the exercise of that power from judicial scrutiny. Deciding where the line should be drawn will not necessarily be a straightforward or uncontroversial task, particularly in the context of an Act as detailed and complex as the *Migration Act*, dealing with a subject as sensitive and complex as immigration processing and refugee determination.

The second point to note is that the privative clause in the *Migration Act* applies alike to the Federal Court and the High Court, the only difference being the time limit for commencing proceedings in either Court.[21] To that extent the privative clause has closed the gap between the jurisdiction of both courts: that should mean that there is little practical justification for proceedings to be commenced in the High Court rather than the Federal Court. The High Court's role in immigration law would thus be limited to hearing appeals from decisions of the Federal Court.

There is, however, an important constitutional difference between the jurisdiction of both courts that is hovering overhead. The Federal Court and its jurisdiction have both been created by the Parliament. What can be given can be

taken away. There is, consequently, no constitutional obstacle to limiting the jurisdiction of the Federal Court by a privative clause.[22] But the High Court's jurisdiction to undertake judicial review is safeguarded by Constitution s 75(v).[23] While the High Court has accepted many times that s 75(v) does not prevent the Parliament from enacting a privative clause, or from expanding the scope of lawful executive action,[24] there is an open question as to whether times have changed[25] and whether the privative clause in the *Migration Act* goes further than any similar clause has gone in the past. Constitutional guarantees and obstacles cannot lightly be ignored. For instance, in the earlier case of *Abebe v Commonwealth*,[26] the High Court only narrowly upheld (4:3) the more straightforward and less severe restrictions on judicial review formerly imposed by Part 8 of the *Migration Act*. It is foreseeable that the High Court could declare the privative clause to be unconstitutional, on the basis that if the Parliament wishes to limit the judicial review jurisdiction of the High Court it must do so by a scheme that spells out more clearly and directly the limits on executive power and the scope of the right to judicial review to correct invalid action.

The privative clause — early developments

For the moment the privative clause has not stemmed the flow of immigration litigation in the Federal Court, though seemingly it has affected the disposition of that litigation. New applications for judicial review are still running at up to 30 per week in the first half of 2002, though the success rate is down to about five per cent, which is lower than the success rate of between 10 to 15 per cent over the previous couple of years. It is thus possible that the privative clause has raised the barrier in judicial review, and some decisions have acknowledged as much. On the other hand, the more common pattern in the litigation to date has been that the Court has indicated that the action would not have succeeded even apart from the privative clause, thus making it unnecessary to consider its meaning and effect.[27] At the risk of generalisation, both the pattern and the tone of recent judgments illustrate a more restrained and less adventurous approach to judicial review by the Federal Court. Possibly this reflects a sensitivity by the Court as an institution to the level of disquiet that had been expressed about the tone and direction of judicial review of immigration decision-making.

It is still too early to make confident predictions about the meaning and effect of the privative clause. It is inevitable that different views will emerge, partly because of the inherent vagueness of a privative clause, but also in keeping with the pattern of conflicting views within the Federal Court that has hitherto marked its immigration law jurisprudence. Three recent examples of that conflict concern whether the Court could review the failure of a Tribunal to 'act according to substantial justice', whether the Court could invalidate a decision by reason that the Tribunal's statement of reasons did not discuss all issues thought by the Court to be material, and the scope of the 'no evidence' ground of review in the former Part 8.[28]

Differences of opinion among judges of the Federal Court on the scope of the privative clause have already begun to surface. Some, on the one hand, have expressed the view that something more than a breach of a provision of the Act must be shown before a decision can be set aside.[29] That view recognises that the

essential purpose of the new scheme is to bolster the authority of the Tribunals to resolve issues of fact and law arising under the Act, and to curb the power of courts to set aside Tribunal proceedings that were undertaken in good faith and that were reasonably related to the legislation being administered. The contrasting view taken by some other judges is that, as a matter of statutory construction of the Act, proper compliance with a particular provision of the Act is indispensable and an essential prerequisite to the exercise of power; the breach of such a provision will thus fall outside the protection of the privative clause. That approach has already been taken in relation to: s 129, requiring that particulars of the ground of cancellation of a business visa be given to the visa holder;[30] s 359A, requiring that a Tribunal provide an applicant with particulars of information that might form the basis of the Tribunal's decision;[31] and in relation to the misconstruction of the statutory test for visa eligibility in the Act and Regulations.[32]

If that line of reasoning prevails it will leave little scope for the operation of the privative clause. Other dangers also lie in its path. In a couple of cases a broader view than hitherto has been taken of what constitutes a lack of 'good faith'.[33] It has been suggested too that a breach of natural justice may not be protected by the privative clause[34] — an odd result, bearing in mind that breach of natural justice was not formerly reviewable by the Federal Court under Part 8, and the recent changes were designed to limit rather than expand the Federal Court's judicial review powers.

The differences of opinion within the Court will be considered in June by a specially-convened bench of five senior judges of the Court. Given the volume of litigation under the Act, and the diversity, complexity and sensitivity of the issues that arise for determination, it is doubtful whether a single decision of the Full Federal Court will resolve all doubts. The likelihood is that the doubts and differences of opinion will continue for some time, and will involve one or more full bench decisions of the High Court.

Controlling judicial review by other means

If, for any reason, the privative clause is either ineffective or found to be invalid on constitutional grounds, the Government and Parliament will face a fresh challenge that may require action on a number of fronts.

As to the framework for judicial review, probably the last remaining option for Parliament is to take up a point made periodically by the High Court that Parliament can alter the substantive law that places limits on executive decision-making.[35] That is, the decision-making power conferred on government officials by legislation can be defined in such a way that matters are left to the judgment or discretion of the decision-maker; such rules as there are in the legislation are not to be treated as rules that if broken cause a decision to be invalid. That proposition is easily stated, but not as easily implemented. The 500 or so pages of detailed rules and principles in the *Migration Act* do not easily lend themselves to simplification or reorganisation along the lines foreshadowed by the High Court. The complexity of this issue is illustrated by the history of litigation over whether the statutory directions to the Tribunals to act according to 'substantial justice' (s 420) or to 'set out the findings on any material questions of fact' (s 430) are directions that convey a substantive and prescriptive legal message. Legislative standards that

are more specifically framed will pose an even harder question. Nevertheless, the challenge laid down by the High Court may one day have to be addressed.

A second objective for the Government is to reduce the delay that is a by-product of the steady growth in judicial review applications. This issue is significant, bearing in mind that over 90 per cent of applications fail and seem speculative at best. Two measures to address the problem of delay were part of the 2001 package of legislative changes. The first was the conferral of jurisdiction in migration matters on the Federal Magistrates Court,[36] which is expected to handle matters in a more streamlined and less formal fashion. Nearly all applications for judicial review are presently commenced in the Federal Court, though some of these have recently been transferred by that Court to the Magistrates Court.

The other measure to reduce delay was the abolition of class actions under the *Migration Act*.[37] The purpose of a class (or representative) action is not to confer new or additional legal rights of a substantive or procedural kind. Rather, it is to allow those with an existing and similar legal claim to join together in a single action represented by one member of the class, and thus facilitate legal proceedings (and the protection of legal rights) for those who might otherwise have difficulty in instituting a separate action. However, the evidence was reasonably clear that class actions under the *Migration Act* were being used also as a delay mechanism. An appreciable number of class members had a doubtful or nonexistent claim to membership of the class but by joining it would qualify for a bridging visa pending determination of their status or claim.[38] The upward trend in litigation suggested that legal claims under the *Migration Act* would not languish in the absence of a class actions procedure.

A third objective of the Government is to confront the underlying trends that spawn immigration litigation. The point which stands out in this respect is that refugee claims constitute roughly 60 per cent of litigation in the migration portfolio. Not surprisingly, major initiatives of the Government have been border control, prevention of people smuggling, and bilateral agreements with the countries from which asylum claimants either come or transit *en route* to Australia.[39]

Finally, any evaluation of the options for containing judicial review of tribunal decisions cannot ignore the need to ensure that the quality of Tribunal adjudication is at a high level. Whether it is at the moment is not easy to gauge, bearing in mind the 125,000 or so cases that are decided each year by the Migration Review Tribunal and the Refugee Review Tribunal and the widely differing views on what constitutes good decision-making. That said, it cannot be ignored that probably every judge of the Federal Court has at one stage or another in the last few years concluded that a Tribunal decision should be set aside for legal error. The recent history of short-term appointments to federal tribunals, amidst a climate of uncertainty about the restructure of the tribunal system,[40] gives further cause for concern. Whether or not those points tell us anything about the quality of tribunal adjudication, removal

of the question mark from this issue would certainly make it easier to argue that external review by tribunals provides a sufficient and adequate system of scrutiny and accountability.

BORDER CONTROL

Between 1999 to 2001 the number of people arriving unlawfully in Australia by boat rose sharply, from an average of 319 per year from 1989-1998, to 3740 in 1999, 2961 in 2000 and 3694 in January to August 2002.[41] It is now indelibly part of Australian history that the issue came to a head when the Government took action in August 2001 to prevent people on board the *MV Tampa* from landing in Australia. The action soon switched from the high seas to the legislative chamber, with the enactment of a raft of new provisions to reinforce Australian border control.

The range of new measures enacted in September 2001 included the following:[42]

- The external Australian territories (Christmas Island, Cocos [Keeling] Island, and Ashmore and Cartier Islands) were excised from Australia's migration zone. The result is that a person arriving unlawfully in such a territory cannot apply for a protection visa under s 36 of the Act unless the Minister consents to an application on public interest grounds.[43] A person in such a territory can also forcibly be removed by the Government to another country that has been declared to have effective procedures for processing asylum claims and for refugee protection (Nauru and Papua New Guinea are currently declared for that purpose).[44] The actions taken by the Government cannot be the subject of review by a tribunal or the Federal Court.[45]
- A person in an offshore territory can qualify only for a restricted category of temporary visa that does not allow permanent residence in Australia, that is valid for three years, that expires if the person leaves Australia for any reason, and that does not entitle the visa holder to sponsor other family members to come to Australia.[46] By contrast, a person who remains in and makes an application for a protection visa from the first safe country they reach after leaving their home country will be eligible to be granted a permanent visa. If the application is made from the second safe country reached by the person (usually Indonesia), they may be granted a temporary protection visa and be eligible to apply for permanent residence and to be joined by their family after four and a half years.
- Stronger penalties for people smuggling were introduced — a maximum penalty of twenty years imprisonment, together with a minimum mandatory sentence of five years for a first conviction and eight years for a second conviction.[47] The power to detain and search boats in Australian waters suspected of harbouring illegal travellers was also strengthened.[48]
- The action taken by the Government in relation to the *Tampa* was (retrospectively) validated.[49] For the future, the issue has been clarified by the insertion of a further provision in the *Migration Act* (s 7A) providing that 'The existence of statutory powers under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, where necessary, by ejecting persons who have crossed those borders'.

It is appropriate to say a few words about the last of those measures because

of the interest generated by the *Tampa* litigation. The Government response to the *Tampa*, of using force to prevent it from entering Australian waters, was a marked departure from earlier practice. The earlier strategy had been to bring illegal boats ashore, to detain the asylum claimants in Australia and to prosecute those suspected of people smuggling. The border control measures in the *Migration Act*, that had been substantially strengthened in 1999,[50] reflected that approach to the problem. For example, s 245C conferred power on Commonwealth officers to 'chase' a foreign ship in order to board it, and then to impound it. The dilemma posed by the arrival of the *Tampa* was that there was no explicit statutory power to 'chase away' foreign ships!

On the same day that Commonwealth Special Armed Services troops boarded the *Tampa* to prevent it from landing at Christmas Island, a Border Protection Bill 2001 was introduced into the Parliament to validate the Government action. The Bill was rejected by the Senate, principally because the Bill provided in unqualified terms — contrary to Constitution s 75(v) and to the litigation then on foot in the Federal Court — that judicial proceedings could not be instituted or continued in any court in respect of action taken under the Bill. A Bill in similar terms was later enacted with that offending provision removed.[51]

Before that occurred, however, proceedings had been commenced in the Federal Court by a Victorian solicitor and a public interest organisation challenging the validity of the Government action and arguing that those on board the *Tampa* were being unlawfully detained. The action succeeded at first instance,[52] but was reversed by a majority of the Full Federal Court in *Ruddock v Vadarlis*.[53] The Full Court held that the Government could rely on the Executive Power conferred by Constitution s 61 to exercise a gatekeeping function at the border. The exercise of that power could involve coercive action to prevent the unauthorised entry of a boat and its occupants into Australian waters. It is interesting to note that a similar result had earlier been reached by the United States Supreme Court. In *Sale v Haitian Centers Council*[54] the Court upheld the legality of executive action by the US Government to intercept and return to Haiti boats carrying asylum seekers.

It is possible that *Tampa*-style litigation could arise again in Australia, but only in the High Court. While the jurisdiction of the Federal Court under the border control provisions of the *Migration Act* has been abolished, the constitutional jurisdiction of the High Court under s 75(v) has necessarily been preserved.[55] Should that jurisdiction be invoked, a host of difficult questions would still arise.[56] In *Ruddock v Vadarlis* Beaumont J observed that a court's jurisdiction can only be invoked to give effect to a right recognised by law, yet those seeking to enter Australia unlawfully had no such right. Furthermore, if Government action was successful in preventing a boat from entering Australian territory, ordinarily a court could not issue an order that would operate beyond the territory.

CRITERIA FOR REFUGEE RECOGNITION

The third topic addressed in the new legislation is the criteria for refugee protection, that is, for granting a protection visa under ss 36 and 65 of the Act.[57] The effect of the legislative changes is to tighten the criteria for granting a visa. Before describing those changes, it is useful to note the background to their introduction.

Hitherto the *Migration Act* did not spell out criteria for granting a protection visa. The eligibility criterion specified in s 36 of the Act was that a visa applicant is a person 'to whom Australia has protection obligations under the Refugees Convention'. The key provision in the Convention is Art 1A which defines as a refugee a person who requires protection in another country 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' in their country of nationality. The meaning of those broad terms — 'well-founded fear', 'persecuted', 'for reasons of', and 'particular social group' — fall to be interpreted ultimately by the courts of the jurisdiction in which a question arises.

Various pressures and cross-currents bear on that process of interpretation.[58] One is that the Refugees Convention has recently come under intense pressure in courts around the world. Partly this pressure stems from military conflicts and ethnic rivalries in different world trouble-spots that have given rise to a large-scale displacement and movement of people among countries. But another pressure is tied more to the phenomenon of administrative law litigation. It is a characteristic of public administration that when the rules that regulate access to a government concession are specific and restrictive, those who fall outside the specific categories of entitlement often focus their attention on residual and discretionary categories of entitlement. That may explain why, as the immigration visa categories have become more rule-based and specific, an increasing number of applications in a range of different countries are being made under the refugee category, a category with an uncertain boundary.

Allied to this is another common feature to which litigation gives rise, of incremental change in the scope and operation of legal concepts and principles. Courts with a common law heritage and function (as in Australia) have long regarded it as inherently part of the judicial function to facilitate change and evolution in the meaning of legal doctrine to take account of changing community values and social conditions. As applied to refugee law, that has resulted in gradual expansion — incremental growth — in the scope of discretionary phrases such as 'persecution' and 'particular social group'. Moreover, a decision by a superior court in one country giving an expanded meaning to such a phrase is likely to influence judicial attitudes in other countries, because of the desirability of ensuring that the Refugees Convention has a uniform international meaning. Thus, refugee cases are notable for the frequency with which Australian courts place reliance on the jurisprudence of other countries and on the writings of leading text-writers on refugee law.[59] By contrast, it has long been affirmed by courts in Australia that they should not pay deference to the view expressed by the Australian Government as to the meaning to be attributed to a legislative phrase.[60]

It is against that background that the Commonwealth Parliament legislated in 2001 to define (and narrow) the meaning of some key terms in the Refugees Convention. This was an uncharacteristic step because of the legislative reluctance that had formerly held sway to establish a nation-specific definition of refugee at odds with that applying in other countries. However, the Australian Government had formed the view that court decisions in Australia had expanded the meaning of key terms, at odds with the

original intention of the Refugees Convention. The success rate in asylum claims in Australia was correspondingly and noticeably higher than in determinations by the United Nations High Commissioner for Refugees.[61]

The main features of the recent changes are in outline as follows:

- The conduct that is claimed by a person to have instilled a fear of persecution must involve serious harm, systematic and discriminatory conduct, and be the essential and significant reason that gives rise to the fear of persecution.[62] Examples given in the legislation of serious harm include a threat to a person's life or liberty, significant physical mistreatment or harassment, or economic hardship or denial of basic services that threatens a person's capacity to subsist. This contrasts with a more liberal standard applied in some earlier court rulings, for example, a 'deprivation of opportunities to compete on equal terms with other members of the relevant society',[63] or routine mistreatment in detention.[64] Similarly, claims that have been accepted in the past probably fall short of the new 'essential and significant reason' standard, such as a claim that members of an ethnic minority were singled out for criminal extortion.[65]
- If the 'particular social group' to which an asylum applicant belongs is the person's family, persecution experienced or feared by other members of the family is to be disregarded if it was not for a Convention reason.[66] This would annul the decision of the Full Federal Court in *Sarrazola*,[67] upholding a refugee claim by a woman who had been threatened with violence if she did not pay her brother's debts.
- Conduct engaged in by a person in Australia (for example, public criticism of the government of their country of nationality) is to be disregarded in determining whether the person has a well-founded fear of persecution, unless the Minister is satisfied that the conduct was not designed to strengthen the person's asylum claim.[68] While Australian decisions had rejected instances of inflammatory conduct designed to create a pretext for a refugee claim,[69] they did accept as relevant conduct in Australia that would be regarded as antagonistic by the person's country of nationality.[70]
- A disqualifying condition stated in Article 1F of the Refugees Convention — that an asylum applicant 'has committed a serious non-political crime' — is defined as meaning a crime the motive for which was wholly or mainly non-political in nature.[71]
- Another disqualifying condition — that a refugee or asylum claimant has been convicted of a 'particularly serious crime' — is defined as including convictions recorded in Australia or elsewhere, and as including convictions for violence against a person, a serious drug offence, and serious damage to property (including in a detention centre).[72]

Those clarifications in the legislation address some but by no means all of the difficult interpretative problems that arise in applying the definition of refugee. Two cases decided by the High Court since the enactment of these changes illustrate the complex range of issues that will continue to arise. In *Singh*[73] the Court held by a 3: 2 majority that a person who was an accessory to the murder by a terrorist group of an Indian police officer

was not disqualified from making a refugee application in Australia. In *Khawar*[74] by a majority of 4:1 the Court held that a Pakistani woman who was not receiving effective police protection against domestic violence by her husband was a member of a particular social group experiencing persecution. Immigration law will continue to be controversial for some time to come.

Editors' note:
References to case law may be followed up at www.austlii.edu.au; and to the *AIAL Forum* at law.anu.edu.au/aial; the references to legal material in the endnotes conform to the *Australian Guide to Legal Citation*. Readers having difficulty in tracing the sources may download this document from www.law.unimelb.edu.au/mulr/ aglc_dl.pdf

References

1 For example, see s 6(2) (entry) and s 18 (deportation) of the *Migration Act 1958* (Cth), as enacted in 1958; generally, see M. Crock, *Immigration & Refugee Law in Australia*, The Federation Press, Annandale (NSW), 1998, Chs 4, 10.

2 See Administrative Review Council, *Review of Migration Decisions*, Report No 25, Australian Government Publishing Service (AGPS), Canberra, 1985; Human Rights Commission, *Human Rights & the Migration Act*, Report No 13, AGPS, Canberra, 1985; Committee to Advise on Australia's Immigration Policies, *Immigration: A Commitment to Australia*, AGPS, Canberra, 1988, Chapter 8, (FitzGerald Committee); Committee for the Review of the System for Review of Migration Decisions, *Non-Adversarial Review of Migration Decisions*, AGPS, Canberra, 1992.

3 The multiplicity of legislative changes occurring between 1991-2001 are summarised in 'Refugee Law — Recent Legislative Developments', *Current Issues Brief, 2000-01*, Department of Parliamentary Library, Canberra, 2001, Appendix 7.

4 Under the *Judiciary Act 1903* (Cth) s 39(2) as it then stood.

5 *Federal Court of Australia Act 1976* (Cth)

6 See the reports in endnote 2 above that underpinned the major legislative changes in 1989 and 1992.

7 For example, applications to the Federal Court rose from 372 in 1993-94 to 1340 in 2000-01: see Department of Immigration and Multicultural Affairs, Fact Sheet No 9, 'Litigation Involving Migration Decisions'.

8 For example, see *Prasad v Minister for Immigration & Ethnic Affairs*, 1985, 6 FCR 155 (failure to discharge a duty of inquiry); *Luu v Renevier*, 1989, 91 ALR 39, 1989, 91 ALR 39 (failure to obtain specialist medical opinion); and *Chan v Minister for Immigration & Ethnic Affairs*, 1989, 169 CLR 379 (unreasonableness in definition of statutory test for refugee claim).

9 This point is explained at greater length in J. McMillan, 'Federal Court v Minister for Immigration', *Australian Administrative Law Forum (AIAL) Forum*, no. 22, 1999, pp. 1-25; and J. McMillan, 'Commentary: Recent Developments in Refugee Law', *AIAL Forum*, no. 26, 2000, pp. 26-32

10 For example, see P. Ruddock, 'Narrowing of Judicial Review in the Migration Context', *AIAL Forum*, no. 15, 1997, pp. 13-21; Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee & Humanitarian Determination Process*, 2000, Chapter 6; J. Basten, 'Judicial Review: Recent Trends', *Federal Law Review*, no. 29, 2001, pp. 365-390; and other references given in McMillan, 1999, ibid.

11 *Re Refugee Review Tribunal; Ex parte Aala*, 2000, 204 CLR 82

12 *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah*, 2001, 179 ALR 238

13 For example, see *Re Refugee Review Tribunal; Ex parte Aala*, 2001, at para 133 per Kirby J; *Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham*, 2000, 168 ALR 407 at para 13 per McHugh J; *Abebe v Commonwealth*, 1999, 197 CLR 510 at para 50 per Gleeson CJ & McHugh J.

14 Migration Legislation Amendment (Judicial Review) Bill, (No 5), 1997

15 Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment Bill (Nos 4 & 5) 1997*, 1997, at para 2.12; see also the report of the Committee the following year on the Migration Amendment Legislation (Judicial Review) Bill, 1998, at paras 2.2-2.5.

16 *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth); the Act commenced operating on 2 October 2001.

17 1945, 70 CLR 598

18 1945, 70 CLR 598 at 615 per Dixon J

19 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section*, 1950, 82 CLR 208 at 248

[20] *R v Murray; Ex parte Proctor*, 1949, 77 CLR 387 at 400

[21] Though the Act involves an attempt to approximate the same period for both courts — 28 days since deemed notification of a decision in the Federal Court (s 477), and 35 days since actual notification in the High Court (s 486A).

[22] See *Abebe v Commonwealth*, 1999, 197 CLR 510 (upholding the constitutionality of the former Part 8), and *NAAX v Minister for Immigration & Multicultural Affairs*, 2002, FCA 263 (rejecting a challenge to the constitutional validity of the new Part 8 as it applies to the Federal Court).

[23] *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*, 1995, 183 CLR 168 at 178-179, 192, 204-205

[24] For example, *Darling Casino Ltd v NSW Casino Control Authority*, 1997, 191 CLR 602 at 630

[25] For example, the s 75(v) remedies are now referred to as 'constitutional writs': *Re Refugee Review Tribunal; Ex parte Aala*, 2000, 204 CLR 82; *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah*, 2001, 179 ALR 238. Emphasis is also given in those and other cases to the humanitarian dimension of refugee determination.

[26] 1999, 197 CLR 510

[27] For example, *SAAD v Minister for Immigration & Multicultural Affairs*, 2002, FCA 206 (Mansfield J) at para [23]; cf *Turcan v Minister for Immigration & Multicultural Affairs*, 2002, FCA 397 (Heerey J)

[28] The conflicting views on the first two topics were discussed and resolved by the High Court in *Minister for Immigration & Ethnic Affairs v Eshetu*, 1999, 197 CLR 611, and *Minister for Immigration & Multicultural Affairs v Yusuf*, 2001, 180 ALR 1. The conflicting views on the no evidence principle are currently before the High Court in appeal against *Minister for Immigration & Multicultural Affairs v Rajamanikkam*, 2000, 179 ALR 495, discussed in Basten, op. cit., 2001, pp. 365-390.

[29] For example, *NAAX v Minister for Immigration & Multicultural Affairs*, 2002, FCA 263 (Gyles J); *NABE v Minister for Immigration & Multicultural Affairs*, 2002, FCA 281 (Tamberlin J); *NABM v Minister for Immigration & Multicultural Affairs*, 2002, FCA 335 (Beamont J); and *SBAP v Refugee Review Tribunal*, 2002, FCA 590 (Heerey J). See also the terse rebuke of two other judges by Gyles J in *NABC v Minister for Immigration & Multicultural & Indigenous Affairs*, 2002, FCA 539 at para [7]

[30] *Wang v Minister for Immigration, Multicultural & Indigenous Affairs*, 2002, FCA 167 (Mansfield J)

[31] *Awan v Minister for Immigration, Multicultural & Indigenous Affairs*, 2002, FCA 594

[32] *SBBK v Minister for Immigration, Multicultural & Indigenous Affairs*, 2002, FCA 565 (Tamberlin J); *Boakye-Danquah v Minister for Immigration, Multicultural & Indigenous Affairs*, 2002, FCA 438 (Wilcox J); and *Kwan v Minister for Immigration & Multicultural Affairs*, 2002, FCA 498 (Finkelstein J)

[33] *SBAN v Minister for Immigration, Multicultural & Indigenous Affairs*, 2002, FCA 591, and *SAAG v Minister for Immigration, Multicultural & Indigenous Affairs*, 2002, FCA 547 (Mansfield J)

[34] *Walton v Ruddock*, 2001, FCA 1839 (Merkel J), contra *NAAX v Minister for Immigration, Multicultural & Indigenous Affairs*, 2002, FCA 565, and *NABM v Minister for Immigration & Multicultural Affairs*, 2002, FCA 335 (Beamont J). See also the Migration Legislation Amendment (Procedural Fairness) Bill 2002 (Cth).

[35] For example, *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*, 1995, 183 CLR 168 at 204-205; *Project Blue Sky Inc v Australian Broadcasting Authority*, 1998, 194 CLR 355

[36] The Federal Magistrates Court was established in 1999, but its jurisdiction in migration matters was conferred in 2001 by the *Jurisdiction of the Federal Magistrates Service Legislation Amendment Act 2001*, (Cth).

[37] *Migration Legislation Amendment Act (No 1) 2001*, (Cth), inserting s 486B of the *Migration Act 1958*, (Cth)

[38] Joint Standing Committee on Migration, *Review of Migration Legislation Amendment Bill (No 2) 2000*, 2000, paras 3.11, 3.128

[39] For example, see the 'Background Paper on Unauthorised Arrivals Strategy', released by the Minister on 6 September 2001.

[40] See Administrative Review Tribunal Bill 2000, rejected by the Senate in 2001; and 'Administrative Law in Transition — The Proposed Administrative Review Tribunal', *AIAL Forum*, no. 27, 2000, pp. 1-47.

[41] K. Betts, 'Boatpeople and Public Opinion in Australia', *People and Place*, vol. 9, no. 4, Table 1, p. 34

[42] See Department of Immigration & Multicultural Affairs, Fact Sheet No 90, 'New Measures to Strengthen Border Control', October 2001.

[43] *Migration Amendment (Excision from Migration Zone) Act 2001*, (Cth), inserting s 46A of the *Migration Act 1958*, (Cth)

[44] *Migration Act 1958*, (Cth) s 198A. Legislation enacted in 2002 provided that a person can be transited through Australia without qualifying for a visa: *Migration Legislation Amendment (Transitional Movement) Act 2002*, (Cth).

[45] *Migration Act 1958*, (Cth) s 494AA

[46] *Migration Legislation (Excision from Migration Zone) (Consequential Provisions) Act 2001*, (Cth), inserting into the Migration Regulations two new visa subclasses — Secondary Movement Offshore Entry (Temporary) Subclass XB447, and Secondary Movement Relocation (Temporary) Subclass XB451

[47] *Border Protection (Validation and Enforcement Powers) Act 2001*, (Cth), introducing s 233C of the *Migration Act 1958*, (Cth)

[48] Ss 245F, 245FA, 245FB of the *Migration Act 1958*, (Cth)

[49] *Border Protection (Validation and Enforcement Powers) Act 2001*, (Cth)

[50] *Border Protection Legislation Amendment Act 1999*, (Cth)

[51] *Border Protection (Validation and Enforcement Powers) Act 2001*, (Cth)

[52] *Victorian Council for Civil Liberties Inc v Minister for Immigration & Multicultural Affairs*, 2001, 110 FCR 452, (North J)

[53] ibid., 2001, 110 FCR 491

[54] 509 US 155, 1993

[55] *Migration Act 1958*, (Cth) ss 245F(8B), 494AA(3).

[56] See J. McMillan, 'The Justiciability of the Government's Tampa Actions', *Public Law Review*, vol. 13, 2002 pp. 5-9.

[57] See the *Migration Legislation Amendment Act (No 6)*, 2001 (Cth), introducing ss 91R-91U and amending s 36 of the *Migration Act 1958*, (Cth). The Act also introduced new evidentiary principles relevant to the determination of protection visa applications. Specifically, an inference adverse to an applicant's claim or credibility can be drawn from their failure to provide documentary evidence of their identity, nationality or citizenship, or to verify information on oath: see ss 91V, 91W.

[58] Generally, see P. Nygh, 'Recent Developments in Refugee Law', *AIAL Forum*, no. 26, 2000, pp. 1-25; 'Migration Legislation Amendment Bill (No 6) 2001', *Bills Digest*, *no. 55, 2001-02*, Department of Parliamentary Library, Canberra, 2001; and A. Millbank, 'The Problem with the 1951 Refugee Convention', *Research Paper 5 2000-2001*, Department of Parliamentary Library, Canberra, 2000.

[59] For example, see *'Applicant A' v Minister for Immigration and Ethnic Affairs*, 1997, 185 CLR 259; *Minister for Immigration & Multicultural Affairs v Khawar*, 2002, HCA 14.

[60] *Corporation of the City of Enfield v Development Assessment Commission*, 2000, 199 CLR 135; though cf *Acts Interpretation Act 1901*, (Cth) s 15AB

[61] Figures cited recently by the Minister were that in 2000-01 primary level acceptance of Afghan nationals in Australia was 81 per cent, and Iraqi nationals 87 per cent, compared to UNHCR acceptance in Indonesia of Afghan nationals (19 per cent) and Iraqi nationals (63 per cent): see Minister for Immigration & Multicultural & Indigenous Affairs, 'Minister's Response to "Debunking Myths about Asylum Seekers"', 5 April 2002.

[62] *Migration Act 1958*, (Cth) s 91R(1),(2)

[63] *'Applicant A' v Minister for Immigration & Ethnic Affairs*, 1997, 190 CLR 225 at 258 per McHugh J

[64] *Paramananthan v Minister for Immigration & Multicultural Affairs*, 1998, 160 ALR 24

[65] For example, see *Perampalam v Minister for Immigration & Multicultural Affairs*, 1999, 55 ALD 431.

[66] *Migration Act 1958*, (Cth) s 91S

[67] *Minister for Immigration & Multicultural Affairs v Sarrazola*, 1999, 95 FCR 517

[68] *Migration Act 1958*, (Cth) s 91R(3)

[69] *Somaghi v Minister for Immigration, Local Government & Ethnic Affairs*, 1991, 31 FCR 100

[70] For example, see *Minister for Immigration & Multicultural Affairs v Mohammed*, 2000, 98 FCR 405.

[71] *Migration Act 1958*, (Cth) s 91T

[72] ibid., (Cth) s 91U

[73] *Minister for Immigration & Multicultural Affairs v Singh*, 2002, HCA 7

[74] *Minister for Immigration & Multicultural Affairs v Khawar*, 2002, HCA 14